No. 5980

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and MARTIN MATHESON,

Appellees.

Upon appeal from the United States District Court for the Western District of Washington, Southern Division

Brief of Appellants

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
Attorneys for Appellants.

Office and Post Office Adress:
611-23 Central Bldg.,
Seattle, Wash.

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SUBJECT INDEX (*Continued*)

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Brief of Appellants

STATEMENT OF THE CASE.

The appellants filed in the District Court a bill of complaint seeking to suspend and set aside an award of compensation in favor of appellee, Martin

Matheson, under the Longshoremen's and Harbor Workers' Compensation Act. This is an appeal from the order of the District Court denying appellants' motion for and interlocutory injunction staying payment of the amount required by the award pending final decision in the District Court.

On October 18, 1928, the appellee, Martin Matheson, was employed by the appellant, Northwestern Stevedoring Company, as a longshoreman on board a vessel at Tacoma, Washington, and sustained an injury when stepping between some loose dunnage and a hatch coaming (Tr. 39). The appellant, Occidental Indemnity Company, is the insurance carrier provided in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Thereafter an award was made by the appellee, Wm. A. Marshall, Deputy Commissioner for the Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Act (Tr. 38-40). It was to review this award that this action was instituted by the appellants.

ASSIGNMENT OF ERRORS.

The following errors were set out in the assignment of errors, and are relied upon by the appellant:

That the United States District Court for the Western District of Washington, Southern Division, erred in entering said order denying complainants' motion for an interlocutory injunction, on the ground and for the reason that it appears from the record herein that the defendant, Martin Matheson, is insolvent, and that, therefore, any payments made under the award pending the decision herein, if eventually favorable to the complainants, could not be recovered, and irreparable damage would result to the complainants, and because said order is contrary to law (Tr. 54-55).

ARGUMENT.

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, being Title 33, U. S. C. Sec. 921, provides in part as follows:

> "(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order, and instituted in the Federal District Court for the judicial district in which the injury occurred * * * * * *
> "The payment of the amounts required by an award shall not be stayed pending fiinal decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, * * * allows the stay of such

payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. * * * ''

It is pursuant to this section that appellants filed their bill of complaint (Tr. 2) and presented their motion for an interlocutory injunction (Tr. 42). A hearing was had on the motion, resulting in the court's filing a memorandum decision (Tr. 45) and entering an order (Tr. 51) denying the motion from which this appeal is taken.

The undisputed testimony on the hearing of the motion was that the appellee, Martin Matheson, was insolvent, and if an interlocutory injunction were not issued staying the payment of the amount required to be paid by the award of compensation, such payments would have to be made, and, if the appellants were successful in their action, said payments could not be recovered from the appellee, Martin Matheson, and the appellants would lose the benefit of any favorable decision received (Tr. 43, 56).

The court in its memorandum decision found that the appellee, Martin Matheson, was insolvent, stating that this fact was not disputed and continuing, says:

"It follows that denial of the stay, pending final determination, would irreparably injure the complainants if the injured defendant should be found, upon final decree, not entitled to any part of the amount awarded him." (Tr. 49).

This conclusion of the court is amply sustained by the following authorities:

Indian River Steamboat Co. vs. East Coast Transportation Co., 10 So. 480, 487; 28 Fla. 387; 29 Am. St. Rep. 258,

Gause vs. Perkins, 56 N. C. 177, 179; 69 Am. Dec. 728,

Deegan vs. Neville, 29 So. 173, 175; 127 Ala. 471; 85 Am. St. Rep. 137,

Kerlin vs. West, 4 N. J. Eq. (3 H. W. Green) 449,

4 Words & Phrases, 3773,

Cleveland vs. Martin, 75 N. E. 772, 777; 218 Ill. 73; 3 L. R. A. (N. S.) 629,

Devon vs. Pence (Ky.) 106 S. W. 874, 875,

32 C. J. 64.

As far as appellants are advised, appellees do not dispute the conclusion of the court on this proposition.

Insolvency Having Been Shown Appellants Were Entitled to Have Their Motion Granted As a Matter of Course.

In view of the fact that the proceedings instituted in the District Court are in the nature of an appeal, it follows that, if the statute granting the appeal provides therefor, the award of the Deputy Commissioner should be stayed pending a determination of the appeal. Section 21 of the Act, as set forth above, directly provides that the award shall be stayed where irreparable damage would otherwise ensue; and, therefore, upon insolvency being shown, the stay should have followed as a matter of course. Without such relief, there is no appeal. The District Court, although refusing in this case to stay the award pending final decision by the District Court, has permitted the filing of a supersedeas bond on the appeal to this court staying all further proceedings (Tr. 64). It was, of course, apparent to the District Court that if such supersedeas were not allowed, an appeal to this Court would in effect be denied, for, long before this case to stay the award pending final decision by under the award would have been made. This is likewise true in so far as the hearing of this matter in the District Court is concerned, and it is appel-

lants' contention that the District Court's refusal to stay the award pending final decision in the District Court was likewise a deprivation of appellants' undoubted right of appeal.

The District Court, while apparently recognizing the force of this contention, did not limit its consideration of the motion to the evidence in support thereof, namely, the insolvency of the appellee, Martin Matheson, but proceeded to consider the merits of the bill of complaint, although the only matter before the court at the time was the appellants' motion for an interlocutory injunction.

The court correctly stated appellants' contention on the merits as follows:

> "It is the contention of the complainants that the finding by the Deputy Commissioner of a 40% disability is unsupported by the evidence; that the evidence shows the existence of an arthritic condition existing before the injury which arthritis was a partial disability; that while the evidence shows the injury aggravated the arthritis, and resulted in an increased degree of disability, that there is no evidence that such increase exceeds 15% of the disability that would have been sustained by the loss of the leg." (Tr. 49).

The court then erroneously proceeds to dispose, not only of the motion, but in effect of the entire cause on its merits, stating as follows:

"If there is no evidence that the disability exceeds 15%, before this case would probably be tried and determined there would have been paid under the award an amount greater than properly allowable. Therefore, it will be assumed, with that fact made certain that complainants would sustain irreparable injury from a denial of the stay but the Court is unable to find that such fact is made reasonably certain."

"The only evidence as to the relative amount of disability to be attributed to the arthritis before the injury as distinguished from the arthritis as aggravated by the injury, expressed in percentages, is the opinion evidence of doctors and surgeons.

* * * * * * * * * *

"The Court is unable to say that in finding that claimant had suffered a 40% disability from the injury the Deputy Commissioner acted without evidence." (Tr. 49-51).

In thus proceeding appellants contend that the court erred in three respects:

First. That the merits of the case were not before the court and should not have been considered.

Second. That the appellants are entitled to a hearing *de novo* before the District Court and therefore the evidence upon which the court's final decision must be based was not before it.

Third. That if appellants are limited to a hearing before the District Court upon the tes-

timony received by the Deputy Commissioner, that the court erred in finding that the award was supported by that testimony.

These three points will be discussed in order.

First: The hearing before the court was upon appellants' motion; no testimony was offered by appellants on the merits, nor could any testimony going to the merits have been properly introduced at that time. The sole question presented was the right of appellants to a stay (in effect a supersedeas), under the provisions of Section 21 of the Act above set out. Insolvency having been shown, it follows that the motion should have been granted and the merits considered in the regular course with full opportunity to the appellants to present such facts or arguments as they deemed necessary.

Second: Appellants contend that they are entitled to a hearing *de novo* before the District Court. That such is the law was decided by the District Court for the Southern District of Alabama, Southern Division on May 27, 1929, in a decision by Ervin, D. J., in the case of *Benson vs. Crowell,* reported in 33 Fed. 2nd. 137. The substance of this decision is that, unless a hearing *de novo* before the District Court is contemplated by the Longshoremen's and

Harbor Workers' Compensation Act, that Act would be in violation of the following provisions of the Federal Constitution, namely:

Section 2, Article 3 which reads:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Fifth Amendment to the Constitution which provides that no person shall be "deprived of life, liberty, or prosperity, without due process of law."

The court proceeds in this decision to demonstrate that the act itself contains provision for such a hearing *de novo*. A few quotations from this exhaustive decision will be sufficient:

> THE COURT: "I think everyone will concede that the proceeding before the deputy commissioner was not a judicial proceeding, but was a mere statutory proceeding by an administrative officer directed and controlled by the Longshoremen's Act. * * *
>
> "The question therefore arises whether or not the act under discussion undertakes to deprive the federal courts of judicial power conferred upon them by the Constitution.
>
> "The answer to this question depends * * * upon the conclusions reached as to the due process clause, and I shall therefore now discuss that. * * *

"In the instant case, where the employee is seeking to hold the employer liable for an injury suffered by the employee in the performance of his duty, there certainly never was any summary or ministerial proceedings recognized either by the common law in England, or by the practice in this country, which permitted a liability to be fastened upon the employer, and his property be subjected to this demand, until after a judicial trial of the rights and questions involved. * * *

"I think no one would be so hardy as to contend that the proceedings provided for in this Compensation Act was a judicial determination of the rights of an employee as against the employer, and, unless there is to be found in the act, either by appeal, injunction or otherwise, the right of the parties to have the liability determined by judicial process and hearing, then the act is unconstitutional.

"It has been urged upon me, as undoubtedly it was upon the other judges who had this act before them, that the court is limited by the act, in its hearing on the injunction, to the question whether or not there was any evidence offered before the deputy commissioner on which he could have found liability, and that the court, under the terms of the act, cannot have a hearing *de novo* and pass upon the merits of the case, but is limited to the question whether or not the commissioner on the evidence before him could have found liability.

"If this be true, then it seems to me necessarily the act was beyond the power of Congress, and is void.

"In *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 238, 40 S. Ct. 527, 64 L. Ed.

908, a case in which under a Pennsylvania statute a valuation of a water works concern by a Public Service Commission of Pennsylvania was made for the purpose of determining a fair rate to be charged by the water company, Mr. Justice McReynolds, writing for the court, on page 289 (40 S. Ct. 528) says:

'Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.

'The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis vs. Atlantic Coast Line Co.,* 211 U. S. 210 (29 S. Ct. 67, 53 L. Ed. 150); *Lake Erie & Western R. R. Co. vs. State Public Utilities Commission,* 249 U. S. 422, 424 (39 S. Ct. 345 [63 L. Ed. 684]). In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.'

"The Fourteenth Amendment applies to the states, while the Fifth applies to the federal government.

"I can see no distinction between valuing the property of a waterworks plant for rate-making purposes, by a commission, and the determination by a deputy commissioner that an employer is liable to an employee for a given

sum because of an injury suffered while in the employment. In the one case, the waterworks plant is denied a proper return upon its investment, so its property is taken without due process of law, while in the other the property of the employer is subjected to execution and sale to pay the award made by the deputy commissioner, and so his property is taken without due process of law. In fact, the latter is the more direct loss, for, while one is denied the right to make a profit, the other is deprived of property already earned.

"Certainly proceedings by a commissioner under this act is not more due process than was the hearing by the Public Service Commission in fixing the rates. In neither instance was there a judicial hearing and determination of the rights of the respective parties. If anything, there is less due process as against an employer of labor because it is common knowledge that he was in no sense carrying on a public function but was conducting a private business.

"Can the provisions of the act in question be treated in any way as giving to the admiralty court the power to hear and determine the facts as well as the law? In section 18 of the Compensation Act it is provided that, in case of default by the employer of the payment of the award within 30 days, the deputy commissioner may have an investigation and determine the amount of the default, and that this determination may be filed in the federal District Court, and it then said: 'such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of a copy enter judgment for the amount declared in default by the supplementary order if such supplementary

order is in accordance with law. *Review of the judgment so entered may be had as in civil suits for damages at common law.'* (Italics mine.)

"Now, what judgment was it that might be reviewed as in civil suits for damages at common law? Was it the judgment of the deputy commissioner or was it the judgment of the District Court? Apparently it was the judgment of the District Court, for the provision was that such supplementary order of the deputy commissioner shall be final, and the court shall enter judgment for the amount declared in default. The only judgment referred to apparently was the judgment of the court. If the judgment of the court, however, was to be reviewed, what error could be found by any other court if the court was required by the act to enter judgment in the amount found by the deputy commissioner?

"Did Congress intend to require the court to enter its order merely on the finding of the deputy commissioner, and to make that order final. Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the deputy commissioner because the act said do it? If so, would not this of itself be an unconstitutional requirement? How can the Congress require a court to enter a judgment as between private citizens without a hearing of the facts by the court?

"However, we find that the court was to enter judgment for the amount declared in default by the supplementary order, 'If such supplementary order is in accordance with law,' so apparently by the very terms of the act the court was required to investigate the findings of the deputy commissioner to see if they were

in accordance with law. It therefore appears likely that it was the judgment of the deputy commissioner which was to be reviewed.

"Subdivision (b) of Section 21 says: 'If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings.'

"That is the same term used in section 18, namely, 'Is in accordance with law.' What did the Congress mean by these words? Surely they did not mean to limit the court in considering the order of the commissioner to the determination that there was no evidence considered by him which would authorize a decree. If on the hearing before the commissioner the evidence did not justify a compensation order by him, then his order would not be in accordance with law. Again, if the evidence offered before the court on the application for an injunction, on the hearing on such application, showed that the award should not be made, then surely the award would not be in accordance with law, because, to be in accordance with law, the facts of the case should justify the award. Again, it is said the 'order may be suspended or set aside, in whole or in part.' Now, if the court is to set it aside in whole or in part, does that not indicate an intention that the court was to have all the facts before it, for, if the court was not confined in its determination to the question, whether the award as a whole was in accordance with law, it must be that Congress intended the court to do complete justice, and to do this the court must have all the facts before it. Again, it will be noticed that there is no provision or requirement for remanding the case to the deputy commissioner. If the court is to set it aside in whole or in part, the court is to write

the final judgment, and, if so, it should be only after hearing all the facts.

"I cannot conceive that Congress ever meant to deprive the employer of labor of the right to a fair judicial hearing before providing that his property might be subjected to the payment of any demands, and therefore I am inclined to treat these provisions found in the act as authorizing the court to go into the real facts and grant a hearing *de novo,* for it is only by so construing the act that I can hold it to be constitutional."

In view of this decision, we submit that the court erred in denying appellants' motion and predetermining the merits of appellants' case prior to full and complete hearing on the merits.

THIRD: If this court is of the opinion that the District Court is limited to a review based solely on the testimony before the Deputy Commissioner, we nevertheless submit, in addition to what has been set forth under "FIRST," that the court erred in finding that the award was supported by that testimony. A transcript of that testimony with the award is appended to the bill of complaint as exhibits (Tr. 6-37; Tr. 38).

It is contended that, under the law that the commissioner's finding should segregate the percentages of disability attributable to the accident and to the

pre-existing arthritis, and that the award should be made only for the former.

The purpose of the Longshoremen's and Harbor Workers' Compensation Act is clearly to place the economic burden for disability resulting from an injury upon the industry and to make the award, regardless of liability upon the part of the employer. In other words, its purpose is to make the industry pay the losses occurring to employees in the course of their employment and resulting therefrom. Congress has recognized that injuries to employees should be assumed as a burden of the industry in like manner as the wearing out of the physical equipment used therein, and whereas when a new or used part of the physical equipment of an industry is destroyed it is replaced and the cost thereof borne by the industry, so should the injury to an employee be so borne by the industry.

Section 8 of the Act being Title 33 U. S. C. Sec. 908, provides as follows:

> "(22) (f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: * * * .

> (2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this sub-division, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury * * * the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury."

The case at bar is covered by sub-division (2), as there is not here a case of permanent total disability. Both sub-divisions (1) and (2) provide that the employer shall pay compensation only for the disability caused by the subsequent injury, that is to say, only for the injury for which the industry itself is responsible. The industry is responsible for only the direct result of the injury and not for the result which is a combination of the injury and some pre-existing condition of the employee, for, to hold otherwise, would be to place an undue burden on the industry not contemplated by the provisions of the Act.

The Act was patterned after the Workmen's Compensation Law of New York, and in the case of *Texas Employers' Ins. Ass'n, et al., vs. Sheppeard,* 32 Fed. 2nd 300, decided in the District Court of the United States for the Southern District of Texas on April 12, 1929, it was held by the court as follows:

> " * * * it is a fundamental rule of statutory construction that the adoption of a statute of another state which has been construed in the courts of that state carries that judicial construction with it in the adopting state."

The New York Act, Section 15, Sub-division 6, now Sub-division 7, originally read as follows:

> "Previous disability. The fact that an employee has suffered previous disability or received compensation therefore shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earnings capacity at the time of the later injury."

By amendment in 1915, the following provision was added:

> "Provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability."

Since said amendment, the courts of New York State have segregated disabilities resulting from accident from pre-existing disabilities and compensated only for the disabilities resulting from the accident.

See

Ladd vs. Foster Brothers Manufacturing Co., 200 N. Y. Supp. 258;

Lewis vs. Lincoln Engineering Corporation, 210 N. Y. Supp. 481;

Przekop vs. Ramapo Ajax Corporation, 212 N. Y. Supp. 426;

DiCarlo vs. Elmwood Construction Company, 214 App. Div. 857;

Klock vs. Rogers, 209 N. Y. Supp. 667;

Blaes vs. E. N. Bliss Co., 163 N. Y. Supp. 722.

The wording of the New York law, as well as of the Act in question, clearly contemplates that pre-existing disabilities should not be included in the compensation granted, and that the industry should bear only the burdens directly resulting from the injury and not those resulting from the pre-existing condition of the employee.

An inspection of the award (Tr. 38-40) discloses that no mention was made by the Deputy Commissioner of the previous existing condition of arthritis and no segregation of disability made as required by sub-division 22 (f) and particularly that portion thereof reading as follows:

> " * * * the employer shall provide compensation only for the disability caused by the subsequent injury."

A brief summary of the testimony will be given to demonstrate the error committed.

Dr. R. C. Schaeffer called as a witness on behalf of the appellants, testified as follows:

> I examined (Martin Matheson) on December 6, 1928. His injury was on October 18th. That was about six weeks after the injury. He is a man sixty years old. Teeth very bad. Pyorrhea and infection of mouth. He walks normally and without a limp, although he is somewhat knock-kneed on the right side. The right knee shows no swelling and no external evidence of injury. He complains of marked tenderness at the attachment of the external lateral ligament into the head of the tibia. He states that all his pain is at this point. Pressure at this point causes pain.
>
> An X-ray examination shows a lessening of the articular space in the outer portion of the right knee-joint. There is some change in the external semilunar cartilage. A stereoscopic X-ray of this knee made by Dr. R. D. MacRae. roetenologist, shows a beginning calcification of the external semilunar cartilage. There is a spur on the outer aspect of the head of the right fibula. There is exostotic growth at the attachment of the patellar ligament to the tibial tubercle. IN OTHER WORDS, THAT WAS EVIDENCE OF A CHRONIC ARTICULAR RHEUMATISM (Tr. 11-12).
>
> ' An injury may precipitate arthritis in a joint, but in this particular case our X-rays were taken about six weeks after the accident and very advanced bony changes were found. THEY COULD NOT HAVE TAKEN PLACE

WITHIN THE SIX WEEKS FROM THE TIME THAT THE INJURY WAS RECEIVED. These were calcified changes. They were bony formations and some of those bony formations—one of those is right at the insertion of the patellar tendon—at a place where there was no soreness whatever (Tr. 12). THE ARTHRITIC CONDITION WAS SUFFICIENTLY ADVANCED TO INDICATE A PROGNOSIS OF PERMANENT DISABILITY. THE DISABILITY OF THAT KNEE AT THE TIME THAT I EXAMINED IT WAS PROBABLY ABOUT TEN PER CENT THAT INCLUDES ARTHRITIS AND EVERYTHING ELSE. THE DISABILITY WAS UNQUESTIONABLY ATTRIBUTABLE TO THIS ARTHRITIS WHICH WAS INDICATED BY THE BONY CHANGES. HE HAS BONY OUTGROWTHS ON THAT KNEE THAT INDICATE A PAST TROUBLE AND A PREVIOUS FOOT TROUBLE. He has such an extensive calcification of the external semilunar cartilage that it has made him knock-kneed. It has thrown his knee in and his foot out. He is going to get a flat foot eventually. THAT CONDITION EXISTED AT THE TIME OF THE INJURY. (Tr. 14). 14).

Dr. A. B. Heaton, called as a witness on behalf of the appellants, testified as follows:

The X-ray shows that the semilunar cartilage was flattened—thin—and showed calcification changes, and also calcification changes on the ends of the tibia. By calcification I mean enlarged bony growths. There is calcification on both the external and semilunar cartilage. THESE BONY CHANGES AND THE CAL-

CIFICATION OF THESE CARTILAGES WERE THERE PREVIOUS TO THE INJURY (Tr. 18). They were more or less extensive throughout the knee-joint. THOSE ARE ARTHRITIC CHANGES, PROBABLY FROM LONG-STANDING INFECTION. His teeth are quite bad and his gums are quite infected (Tr. 19). MR. MATHESON'S DISABILITY IS A COMBINATION OF BOTH THE PREVIOUS CONDITION AND THE INJURY (Tr. 20). The percentage of the disability of that knee at the present time, considering the full function of the knee at 100%, is 30 or 40 per cent. I wouldn't say that it was mostly attributable to the injury (Tr. 21). I have noticed that he has always walked kind of knock-kneed (Tr. 22) during the last seven or eight years. He now has 100 per cent of the leg for a little while, but it does not last, and I come to my conclusion as to disability based upon how long it takes him to play out (Tr. 23).

Dr. H. T. Buckner, called as a witness on behalf of the appellants, testified as follows:

My examination disclosed the following:

Teeth show marked pyorrhea. Throat red and infected. Both legs are the same length. There are many varicose veins of both legs with marked brownish discoloration which usually accompanies such conditions. Has marked flattening of both feet, both longitudinal and transverse arches. There is also some pronation of both feet. Right knee: There is a slight knock-knee tendency with some slight limitation in flexion and extension. There is a slight lateral instability (Tr. 27). The X-ray showed no evidence of any fracture. He had a marked

lipping, indicative of an osteo-arthritis. The injury sustained is what is commonly known as sprain of the knee.

"Q. What would you estimate the extent of Mr. Matheson's permanent partial disability, relating this disability to the right knee-joint, and considering the normal function of that knee-joint as 100 per cent, what would you consider to be Mr. Matheson's permanent partial disability directly resulting from this accident?

A. Well, I would estimate his relaxation of the knee to be about ten per cent—that is, of the internal lateral ligament.

Q. If the bony changes which you found so marked in Mr. Matheson's knee from the X-rays had never been affected by the injury, was the condition sufficiently progressive so that it would in your opinion ultimately disable him?

A. Yes, it would.

Q. If there had been no arthritis present in this knee, was there any finding to indicate any circumstances resulting from the injury (Tr. 28) which would keep him from recovering as the normal sprain of a knee would recover?

A. No, if he did not have any arthritis in his knee I should think that he would make an ordinary recovery. He might have some relation of the lateral ligament." (Tr. 29).

He is a man past sixty-three. His period of doing hard work is past. Bony changes normally appear in the bone in and about the joints. He has a degree of focal infection, of marked pyorrhea and a red and infected throat, which is an indication of infection and arthritic bony changes of that type are more or less a progressive disease, anyway (Tr. 29).

> He has no more than 15% or 20 per cent at the very maximum of the disability of the knee even with the arthritic condition (Tr. 30).

Dr. Roger Anderson called as a witness on behalf of the appellee, testified as follows:

> I found there was a hyperthropic osteoarthritis and that the injury had aggravated his pre-existing arthritis (Tr. 31). From examination made on April 12, 1929, it is my opinion that there was at least 35 to 45 per cent of disability in regard to the function of his right leg, taken as a whole, for his heavy previous duty of longshoring, both as a result—that is, the disability is both the result of his existing arthritis and of his injury (Tr. 32).
>
> IN MY OPINION, THERE WILL BE A 15% PERMANENT PARTIAL DISABILITY OF THE FUNCTIONS OF THE RIGHT KNEE (Tr. 34) AS A RESULT OF THE ACCIDENT (Tr. 35). THE STATEMENT THAT I MADE TODAY, COVERS BOTH THE RESULT OF THE ACCIDENT AND OF THE DISEASE (Tr. 34).

From the foregoing testimony it appears, without dispute, that there was a pre-existing condition of arthritis. The appellants therefore submit that, based only on the testimony received by the Deputy Commissioner, the view of the trial court was erroneous both on the facts and the law. The award has charged the employer with the loss sustained by the employee resulting from both his previous con-

dition of arthritis and the injury, whereas under the Act it is clearly contemplated that the employer shall pay only that proportion of the injury attributable to the accident.

Appellants respectfully submit that the Order of the District Court should be reversed.

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,

Attorneys for Appellants.